United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6081

United States Court of Appeals
FOR THE SECOND CIRCUIT

B P/S

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellant,
against
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.
75-6081

PHILIP MORRIS INCORPORATED,
Plaintiff-Appellant,
against
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.
75-6085

R. J. REYNOLDS TOBACCO COMPANY,
Plaintiff-Appellant,
against
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.
75-6088

LOEW'S THEATRES, INC.,
Plaintiff-Appellant,
against
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Defendants-Appellees.
75-6087

AMERICAN BRANDS, INC.,
Plaintiff-Appellant,
against
FEDERAL TRADE COMMISSION, et al.,
Defendants-Appellees.
75-6090

LIGGETT & MEYERS INCORPORATED,
Plaintiff-Appellant,
against
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.
75-6089

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPEAL BRIEF OF PLAINTIFFS-APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPEAL BRIEF OF PLAINTIFFS-APPELLANTS

Issue Presented for Review

Where appellants are threatened with the accrual of potentially massive civil penalties while they seek in good

faith a judicial determination of their compliance with Federal Trade Commission consent orders, did the Court below err in denying a stay of the accrual of such penalties *pendente lite* on the ground that the applicable provision of the Federal Trade Commission Act provides for maximum daily penalties per violation rather than for fixed, mandatory penalties?

Statement of the Case

Nature of the Case, Proceedings and Disposition Below

These are appeals from the Order of the United States District Court for the Southern District of New York (Honorable Charles H. Tenney), dated August 28, 1975, denying appellants' motions for a stay of the accrual of statutory penalties under Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*) (reproduced at 22, *infra*).

Appellants are six cigarette manufacturers (hereinafter sometimes referred to as the "companies") who brought these actions against the defendant government agencies and officials on August 15, 1975. The actions were consolidated before Judge Tenney on August 25, 1975. The complaints challenge the legality of determinations issued by the Federal Trade Commission on August 1, 1975, that—notwithstanding the Commission's prior public statements that the companies' advertising was in compliance with 1972 Commission consent orders—an unspecified number of cigarette advertisements and promotional materials of each company were in violation of those consent orders. The complaints seek declaratory and injunctive relief that the Commission's determinations are erroneous and contrary to law and that the companies are not liable for civil penalties in connection therewith.

By Orders to Show Cause signed on August 15, 1975, and made returnable August 25, 1975, the companies applied for a stay of the accumulation of statutory penalties *pendente*

lite. Defendants opposed the stay applications, and a hearing was held on the applications on August 25, 1975, before Judge Tenney.

On August 28, 1975, Judge Tenney denied the motions for stay of penalties. In so ruling, the Court held inapplicable the principles set forth in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961), upon which plaintiffs had relied, on the ground that the penalty provision involved in that case called for mandatory, fixed daily penalties, while the statutory provision involved here, 15 U.S.C. § 45(*l*), "merely fixes the upper limit of the penalty and any penalties to be ultimately assessed are discretionary with the court." (Appendix ("App.") at A298).

Preliminary Statement

The Federal Trade Commission has taken extraordinary, unwarranted and, so far as appellants are aware, unprecedented action in issuing on August 1, 1975 a formal "determination" that the six companies are in violation of consent orders issued in March 1972 with respect to their cigarette advertising. The companies vigorously and in good faith dispute this determination, which is in conflict with Commission statements to Congress in December 1972 and January 1974 that their advertising is in compliance with the consent orders. Nevertheless, by the very fact of issuing the determination and announcing its intention to seek civil penalties, the Commission has confronted the companies with a classic Hobson's choice. The companies have two alternatives:

1. They can immediately change their advertising in an attempt to comply with the Commission's determination, with no assurance that the changes would satisfy the Commission's ill-defined demands, or

2. They can continue with their advertising.

If they choose the first option, they do so at substantial cost without first having had an opportunity to test the legality of the Commission's position in court. If they choose the second alternative, knowing that the Commission regards their advertising as unlawful and that it intends to seek civil penalties, they run a serious risk of judgments potentially amounting to many thousands of dollars a day—with the clock running until the government commences its action and then throughout the enforcement proceedings.

Contrary to the decision of the District Court, it is not material that the penalties with which the companies are threatened are "discretionary." The threat of massive and ever-mounting penalties is the clear, present and intended result of the Commission's determination. As the cases discussed below—involving both discretionary and mandatory penalties—make clear, the dilemma created by that threat cannot lawfully be imposed. The Order of the District Court should be reversed, and appellants should be granted relief from the accumulation of any further penalties until the issues presented by the Commission's determination can be adjudicated.

Statement of Facts

A. *Background Facts*

In 1965, Congress enacted legislation which required a warning statement with respect to smoking and health on each cigarette package.* The statute, amended in 1969, does not require the inclusion of a warning statement in cigarette advertising or promotional materials. However, beginning about April 15, 1971, some cigarette manufacturers voluntarily included the warning statement in certain of their advertising. (Verified Complaint, *Philip Morris Incorporated* v. *Engman, et al.*, 75 Civ. 4048, ¶6 (hereinafter "Philip Morris Cplt."), App. at A41-A42).

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* The Federal Cigarette Labeling and Advertising Act, 79 Stat. 282. The phrasing of the required warning statement was amended by the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1333.

In July 1971, the Commission sent the companies a proposed complaint, which alleged that the warning statement in advertising was not sufficiently clear and conspicuous, and was therefore a deceptive practice in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission simultaneously offered to negotiate a settlement of the proposed complaints by consent orders to cease and desist. (Philip Morris Cplt. ¶6, App. at A41-A42).

The six companies thereupon jointly entered into intensive negotiations with the Commission's Staff. Since the Commission's proposed consent orders did not define "clear and conspicuous disclosure", the Commission's Staff and counsel for the companies agreed at the outset that it would be imperative to particularize the meaning of the term, as it applied to the consent orders, by providing concrete specifications for the advertising warning statement to be required. The negotiations were closely monitored by the Commissioners themselves, who reviewed "mock-up" advertisements demonstrating alternative presentations of the warning statement, and who approved or rejected various approaches which the Staff and the companies had developed. (Verified Complaint, *American Brands, Inc.* v. *Federal Trade Commission, et al.*, 75 Civ. 4051, ¶¶11, 13 (hereinafter "American Cplt."), App. at A106-A108).

The negotiations culminated in six agreements and consent orders, identical as to each company, issued by the Commission on March 30, 1972 (*e.g.*, App. at A50-A57 for Philip Morris Incorporated consent order). The orders prescribe in minute detail the format of the warning statement to be included in newspaper, magazine and billboard advertising, transit cards, leaflets, direct mail circulars, programs, paperback book inserts, and point-of-sale promotional materials. (Philip Morris Cplt. ¶7, App. at A42).

The companies thereupon revised their advertising and promotional materials to conform with the requirements of the consent orders, and the warning statement has appeared

in conformity with the orders in thousands of newspaper and magazine advertisements, on billboards, and on point-of-sale materials. (Philip Morris Cplt. ¶9, App. at A42-A43).

The consent orders required the submission of a compliance report. In August and September 1972, such reports were submitted to the Commission by the six companies. The compliance reports included copies of representative advertisements and promotional materials containing the warning statement required by the consent orders. The Commission did not communicate any objection to the companies with respect to the compliance reports; rather, in December 1972, the Commission, by letters to each company, informed them that "no compliance action by the Commission is indicated at this time." (Philip Morris Cplt. ¶10, App. at A43).

Section 8(b) of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §1337(b), requires the Commission to submit an annual report to Congress concerning, *inter alia*, "current practices and methods of cigarette advertising and promotion." In its report dated December 31, 1972, the Commission advised Congress:

> "Advertisements containing the disclosure statement in the format required by these [consent] orders began to appear in May of 1972, and by the end of October, *all cigarette advertisements observed by the Commission staff were being published in accordance with the terms of these orders.*" *Federal Trade Commission Report to Congress*, December 31, 1972, p. 4. (Emphasis supplied.)

In its next annual report to Congress, dated December 31, 1973, but actually issued on January 23, 1974, the Commission publicly and officially repeated that "by October of 1972, almost all cigarette advertising published in this country was in compliance with the terms" of the consent orders. *Federal Trade Commission Report to Congress*, December 31, 1973, p. 1.

The companies relied on the Commission's acceptance of their compliance reports and on the Commission's official reports to Congress. They believed that the Commission deemed the depiction of the warning statements in their advertising and promotion to be in conformity with the consent orders. (Philip Morris Cplt. ¶13, App. at A44).

B. *The Staff's Investigation*

Although the companies had never received indication that the Commission was dissatisfied with their performance under the consent orders, they were informed by the Commission Staff in April and May of 1974 that the Compliance Division was instituting an investigation into their compliance with certain provisions of the consent orders. All of the companies cooperated in the ensuing investigation, at substantial expense. (Philip Morris Cplt. ¶14, App. at A44-A45).

The companies expressed their good faith belief that their advertising practices were in conformity with the requirements of the consent orders. Nevertheless, in an effort at accommodation, and to avoid future compliance questions, the companies attempted to resolve the issues in dispute. To that end the companies sought to obtain specifications of the claimed violations. Additionally, the companies offered to discuss refinements in the presentation of the warning statement under the consent orders. The Staff's response to these requests and offers was a demand that as a precondition to any negotiations the companies would have to make a threshold payment of a sum exceeding six million dollars, for largely undetailed alleged past violations. (American Cplt. ¶¶43, 44, 45, App. at A116-A117).

C. *The FTC's Determination of Non-Compliance*

By letters dated August 1, 1975, the Commission notified each company that it "has determined" that each of them

had violated its consent order, and that it was the Commission's "intention to commence for these violations an action for civil penalties and other relief." (*e.g.*, App. at A58-A61).

The Commission's letters noted various generalized categories of alleged violations, which were basically the same as those asserted by the Staff in its investigation. With respect to certain of these categories, the Commission stated that it would immediately notify the Attorney General, pursuant to 15 U.S.C. § 56(a)(1) (reproduced at 22, *infra*), of its intention to commence an action for civil penalties and other relief. With respect to the other alleged violations, the Commission stated that it would "hold a civil penalty action in abeyance for 180 days," but if at the expiration of such period the companies had not "corrected" these alleged violations in accordance with the Commission's demands, "civil penalties and other relief" would be sought by the Commission for such alleged violations. With few exceptions, the August 1, 1975 letters did not identify particular advertisements which the Commission deemed violative of the consent orders, nor did they indicate what specific measures the manufacturers should or could take to "correct" such violations. (Philip Morris Cplt. ¶¶16, 18, App. at A45-A47).

Under the procedure for the initiation of civil penalty actions prescribed by newly enacted 15 U.S.C. § 56(a)(1), the Commission notifies the Attorney General of its view as to an alleged violation and the Attorney General is authorized to institute such an action.* If the Attorney General does not commence such an action within 45 days, the Commission may institute an action for civil penalties in its own name. Once the Commission notifies the Attorney General, there is no assurance that he will commence the suit;

* Appellants have been informed by government representatives that the Commission forwarded the statutory notice to the Attorney General in late August or early September 1975.

or, if he determines not to do so and accordingly remands the case to the Commission, that the Commission itself will bring its suit within any specified time. What is certain from the Commission's letters of August 1, however, is that at some future time, the government will in fact institute an action seeking to impose civil penalties upon the companies based on the alleged violations which the Commission has determined exist.

In the meantime, the companies are exposed to the risk of steadily mounting penalties in staggering amounts. Paragraph 8 of the 1972 Consent Order Agreement provides that appellants "may be liable for a civil penalty of up to $5,000 for each violation of the order after it becomes final." The statute, 15 U.S.C. § 45(*l*), provides that "[e]ach separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense."

ARGUMENT

POINT I

Supreme Court Rulings Have Established That in the Circumstances Presented Herein Appellants are Entitled to a Stay of the Accrual of Civil Penalties as a Matter of Law.

A stay of accumulating penalties is required under the circumstances herein so that the companies are not exposed to the threat of ever-mounting monetary penalties while seeking in good faith a judicial test of the Commission's determination. It is respectfully submitted that the District Court's Order denying such a stay contravenes definitive Supreme Court rulings which establish that in the circumstances presented herein the companies are entitled to a

stay of penalties as a matter of law in order to protect their right of judicial review of the Commission's determination. Contrary to the District Court's ruling, there is no basis for distinguishing cases involving mandatory penalties from those involving discretionary penalties.

A long line of Supreme Court decisions establish that a party subject to administrative action must be given the opportunity to obtain a judicial test of the validity of such action, and as a matter of due process cannot be subjected to the risk of substantial penalties accumulating during the course of the judicial proceeding—regardless of the ultimate determination on the merits. As the Supreme Court has declared in this context:

> "[T]he right to a judicial review must be substantial, adequate, and safely available; but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley So. Ry. Co.* v. *Georgia,* 235 U.S. 651, 661 (1915).

Specifically, the Supreme Court has determined that the right to judicial review is not "adequate" or "safely available" if statutory penalties will accrue pending the judicial challenge—regardless of whether the statute fixes a mandatory daily penalty or, as here, fixes a maximum daily sum with the actual amount to be imposed at the court's discretion. The Supreme Court has declared that a penalty provision such as 15 U.S.C. § 45*(l)* can pass constitutional muster only if the person subject to the cumulative penalty can in good faith seek a prompt judicial determination of the validity of the agency action during which time the accrual of penalties is stayed.

Illustrative of these principles is *Wadley So. Ry. Co.* v. *Georgia, supra,* involving an action by the State of Georgia to collect a statutory penalty from the railway for non-

compliance with an order of the Georgia Railroad Commission to cease an allegedly discriminatory shipping practice. Non-compliance with the order exposed the company to penalties under a statute which provided for discretionary penalties up to a maximum daily amount, in a manner strikingly similar to the provision involved herein:

> "[Any corporation which fails to comply with such order shall] forfeit to the state of Georgia not more than $5,000 for each and every offense, the amount to be fixed by the presiding judge. . . . Every violation . . . shall be a separate and distinct offense [and] in case of the continued violation, every day the violation thereof takes place shall be deemed a separate and distinct offense." 235 U.S. at 654.

In light of the possible daily accumulation of statutory penalties, the Supreme Court declared that such a statute "would be void . . . if the right of review actually given was one of which the carrier could not safely avail itself." *Id.* at 666. Although the Court rejected the railway's claim that the penalty statute failed to pass constitutional scrutiny, it reached this conclusion only because the railway could itself have sought judicial review of the agency action, during which "penalties could not accrue while the question of the validity of the rates was being determined in appropriate judicial proceedings instituted in a court of equity for that purpose . . . ." *Id.* at 668. The Supreme Court concluded:

> "If the [company] had availed itself of that right, and—with reasonable promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If, in that proceeding, the order had been found to be valid, the carrier would thereafter have

> been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication" *Id.* at 669.

Thus, the Supreme Court declared, as a matter of constitutional necessity, that the statutory penalties would be stayed during a judicial challenge against the agency action—regardless of the ultimate disposition of that challenge.

Similarly, in *Oklahoma Operating Co.* v. *Love,* 252 U.S. 331 (1920), Mr. Justice Brandeis, speaking for the Supreme Court, declared unconstitutional a statute which provided that the validity of certain rates for laundry services could be reviewed only by defending a contempt proceeding for violation of the rates. Disobedience of an administrative order establishing rates exposed the violator to a discretionary penalty "not exceeding $500 a day," with each day's continuance constituting a separate offense. A company subject to the rates had sought preliminary relief restraining the agency involved from enforcing the penalties pending a judicial determination of the validity of the rates. The Supreme Court held that the company was entitled to such temporary relief. Moreover, the Court ordered that even if the rates were found on remand to be legal and not confiscatory:

> "a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory." *Id.* at 338.

These same constitutional considerations led the Supreme Court in 1961 to reaffirm the principles established in *Wadley* and *Love* in a case dealing with Section 10 of the Federal Trade Commission Act, 15 U.S.C. § 50, which provides for a mandatory penalty of $100 for each day of noncompliance with a Commission order or subpoena. In *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961), *aff'g* 285 F.2d 607 (2d Cir. 1960), the Court affirmed the judgment of this Court by rejecting the argument that imposition of

the $100 daily forfeiture mandated under Section 10 would deprive St. Regis of property without due process—but only because St. Regis "did not try to obtain judicial review prior to the commencement of this action by the Government, *nor did [St. Regis] seek a stay once the litigation had begun.*" 368 U.S. at 225 (Emphasis supplied). The Supreme Court cited its earlier decision in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), for the proposition that courts should not be powerless to act when "ruinous penalties would be sustained pending a good faith test of [the] validity [of agency action]." 368 U.S. at 226. *See also Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300, 310 (1937) (stay of penalties available under statutory provision which established both minimum and maximum dollar amount); *St. Louis, Iron Mt., & So. Ry. Co.* v. *Williams*, 251 U.S. 63 (1919) (same).

Significantly, on granting certiorari in *St. Regis*, the Supreme Court granted the company's application for a stay of civil penalties pursuant to Section 10(d) of the Administrative Procedure Act, "to the extent of tolling, as of the filing of its petition [for the writ of certiorari], and pending this Court's disposition of the writ of certiorari, the further running and accumulation of forfeitures under § 10 of the Federal Trade Commission Act . . . ." 365 U.S. at 858. The Supreme Court granted this interim relief even though both lower courts had ruled adversely to St. Regis' position on the merits.

The lower courts have applied the principles enunciated by the Supreme Court, and have consistently awarded temporary relief staying the accumulation of statutory penalties pending a good faith test of the validity of agency action. Such relief has been granted whether the relevant statute fixes a daily penalty, *e.g., Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1394 (5th Cir. 1971), or merely specifies the maximum sum which can be imposed for non-compliance, *e.g., United States* v. *Pacific Coast European Conference*,

451 F.2d 712, 717-19 (9th Cir. 1971); *Allen* v. *Omaha Live Stock Commission Co.*, 275 F. 1 (8th Cir. 1921); *Highland Farms Dairy, Inc.* v. *Agnew*, 16 F. Supp. 575, 585-86 (E.D. Va. 1936), *aff'd*, 300 U.S. 608 (1937); *cf. Continental Baking Co.* v. *Dixon*, 283 F. Supp. 285 (D. Del. 1968) (stay of penalties becomes available under 15 U.S.C. § 45(*l*) after penalties start to accrue).

Appellants respectfully submit that the District Court misconceived the relevance of the distinction between a penalty statute fixing an absolute daily amount and one setting an upper dollar limit per day. To say, as did the Court below, that appellants face only the normal "risks attendant in any litigation," (App. at A 299) is to disregard the facts. The threat of accumulating penalties is far more grave for appellants, who face the potential of penalties of untold thousands of dollars daily,* than it is for a Commission respondent facing mandatory daily penalties of $100. For appellants to have as their only hope for protection the possible equitable determination of a trial court at some unknown date in the future, is to place them in a posture of having to test their good faith objections to the Commission's determination with loaded pistols to their heads.

Floersheim v. *Engman*, 494 F.2d 949 (D.C. Cir. 1973), *reversing & modifying* 346 F. Supp. 950 (D.D.C. 1972), upon which the government relied in the District Court, is distinguishable from the instant case in a number of respects. Unlike the present case, which involves a judicially untested consent order, *Floersheim* involved a litigated cease-and-desist order the validity of which had earlier been appealed to another Circuit Court of Appeals. The Court

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* Although the government has not yet specified the amount of daily penalties it will seek against the companies, the Commission has previously urged that penalties imposed for non-compliance with a Commission cease-and-desist order should be computed on the basis of a separate violation for each day and each separate broadcast of a commercial. *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 435 (2d Cir. 1974). Considering the volume of advertisements and promotional material disseminated by the appellants, the potential daily monetary risk becomes mind-boggling under this theory.

of Appeals for the District of Columbia Circuit held in *Floersheim* that questions with respect to the meaning of the order could properly be presented to the Court of Appeals for the Ninth Circuit, which had originally passed upon the legality of the cease-and-desist order. *Compare Rettinger* v. *FTC*, 392 F.2d 454, 457-58 (2d Cir. 1968), in which this Court indicated its understanding why a company faced with the financial risks of a future civil penalty suit would institute its own proceeding, and suggested that an action seeking review of an allegedly arbitrary change in the Commission's interpretation of a consent order could be instituted in the District Court.

Moreover, neither *Floersheim* nor *United States* v. *Beatrice Foods Co.*, 322 F. Supp. 139 (D. Minn. 1971), upon which the government also relied in the Court below, involved companies subject to daily-accumulating penalties during the pendency of their lawsuits. The controversy in *Floersheim*, as is clear from the District Court opinion therein, concerned in relevant part the rejection of a compliance report which detailed the manner and form in which Floersheim intended to comply with a Commission cease-and-desist order. Floersheim submitted revised debt collection forms which he intended to use, but had not yet used, in his business. 346 F. Supp. at 952. The Commission rejected the compliance report and wrote a letter to Floersheim warning that use of the rejected forms "may subject" him to a suit for civil penalties. *Id.* at 952-53. Thus, the plaintiff in *Floersheim* was not risking any penalties whatsoever when he instituted suit. Indeed, a final agency determination to institute a compliance action had not yet been reached.

In *Beatrice Foods* the government had sought only civil penalties up to the date of the filing of its complaint against the defendant. No controversy yet existed as to the accumulation of penalties from that date forward, and Beatrice remained free to renew its motion for a stay in the event

that the government filed a supplemental complaint for penalties accruing after the suit was filed.*

In contrast to *Floersheim* and *Beatrice Foods,* appellants herein have been formally notified by the Commission that advertisements and promotional materials they currently employ and have used since 1972 are, in the Commission's judgment, in violation of the consent orders, and as a result potentially massive penalties are currently accruing daily. Although the companies have been notified that the government will in fact bring suit on some indefinite date to recover civil penalties, such an action has not yet been instituted—but possible daily penalties will nevertheless continue to mount unless and until judicial relief is obtained. Thus, the companies are clearly at risk of daily penalties at this very instant.

It is this critical distinction—that appellants herein are presently subjected to a risk of accumulating penalties during the course of their review proceeding—which calls into play the Supreme Court cases, discussed *supra,* and which requires the granting of the temporary relief sought by the companies in the District Court. The District Court's endorsement of the government's position is directly contrary to these definitive Supreme Court decisions and is in violation of the policy embodied in decades of rulings that a stay of penalties is required during a good faith judicial challenge to an agency determination.

The argument accepted by the District Court is essentially the same as the one rejected by the Supreme Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967). There, as here, the plaintiffs had claimed that governmental action forced them into the dilemma of either complying—thereby losing the right to judicial review—or resisting—thereby

* To the extent that the district court in *Beatrice* declared that the discretionary nature of the specific amount of penalties to be assessed under 15 U.S.C. § 45(*l*) makes a stay of penalties unnecessary during the pendency of an enforcement proceeding, it is respectfully submitted that the decision was erroneous because it failed to recognize, and is contrary to, the binding Supreme Court decisions discussed above.

risking serious sanctions. The government contended that the plaintiffs were not entitled to judicial protection because the only risks they faced could be ameliorated by the exercise of discretion. The government represented that, for its part, it would exercise its prosecutorial discretion and commit itself not to seek criminal sanctions, so that the plaintiffs would be faced only with possible injunctive relief at the conclusion of a future civil action to be brought by the government. The Court was unimpressed with these representations, stating:

> "We cannot accept this argument as a sufficient answer to petitioners' petition. This action at its inception was properly brought and this subsequent representation of the Department of Justice should not suffice to defeat it." *Id.* at 154.

Similarly, here the risk of massive and ever-mounting penalties which places appellants in jeopardy and threatens their right to a judicial test of the validity of the Commission's determination is a real and present threat. The possibility that this threat might be mitigated at some indefinite time in the future cannot be relied upon to defeat their legitimate request for judicial relief. This is the essence of the principle enunciated by the Supreme Court in *Wadley So. Ry. Co.* v. *Georgia, supra* at 661, for a right of judicial review is merely "nominal and illusory" if it must be exercised "only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law."

POINT II

Appellants Clearly Satisfy the Standards Employed by the District Court for Determining the Propriety of the Temporary Relief They Seek.

Although appellants believe that they are entitled to a stay of penalties as a matter of law, the District Court concluded that appellants would be entitled to a stay of penalties only if they satisfied the standards applicable

to preliminary injunctions. Assuming *arguendo* the correctness of Judge Tenney's determination that such equitable standards do apply to the appellants' motions, it is respectfully submitted that the District Court misapplied the facts to the applicable criteria, requiring that this Court reverse the Order entered by the Court below. *See Omega Importing Corp.* v. *Petri-Kine Camera Co.*, 451 F.2d 1190, 1197 (2d Cir. 1971); *W.E. Bassett Co.* v. *Revlon, Inc.*, 354 F.2d 868, 871 (2d Cir. 1966).

As recognized by Judge Tenney, the established rule in this Circuit is that a preliminary injunction properly should issue:

> "upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sonesta Int'l Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973).

Accord, Missouri Portland Cement Co. v. *Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

It is also clear that the purpose of preliminary relief is to "prevent... any further perpetration of injury... and... to protect . . . rights from further complication or injury until the issues can be determined after a full hearing." *Benson Hotel Corp.* v. *Woods*, 168 F.2d 694, 696 (8th Cir. 1948). *See also Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969).

There is compelling justification for the grant of the relief sought by appellants under the foregoing criteria. First, there can be no doubt that the instant case involves "sufficiently serious questions going to the merits to make them a fair ground for litigation"—an issue not reached by Judge Tenney (App. at A260, A297). The Staff's interpretations of the language of the consent orders apparently adopted in the Commission's determination are plainly subject to legitimate dispute. The position of the companies

with respect to the meaning of the consent orders is fully in keeping with the orders' language and intent, as confirmed by the Commission's response to the companies' compliance reports and its reports to Congress.

Furthermore, the hardships that the companies will suffer if the requested relief is not granted far outweigh any purported harm to the public interest if temporary relief were granted. Appellants have already detailed the risk they face of massive penalties which are accumulating every day. This risk and the resultant inhibition of their constitutional right to judicial consideration of the Commission's action are real, as recognized by the Supreme Court in the decisions discussed in Point I, and the threat of penalties becomes more onerous every day. The District Court's conclusion that "plaintiffs' risks here are no greater than the risks attendant in any litigation," (App. at A299) ignored the realities of the situation in which the companies have been placed, and grossly misapplied the facts to the standards of hardship established by this Court.

Balanced against the possible irreparable injury to the companies resulting from denial of a stay of penalties is the asserted harm to the public if a temporary stay were granted. *See Sonesta Int'l Hotels Corp.* v. *Wellington Associates, supra* at 250. Although the District Court found it unnecessary to examine this aspect of the preliminary injunction standard, appellants respectfully submit that no realistic harm will result to the public if the accumulation of penalties is temporarily stayed and that, therefore, the balance of hardships does in fact tip decidedly in their favor.

First, Congress has required that the cigarette warning statement must be placed only on cigarette packages—not on advertisements and promotional materials. Thus, there has been no Congressional determination that the public interest at this time requires the cigarette warning statement on advertisements and promotional materials. Indeed, the Federal Trade Commission's authority, under

Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), to require the warning on advertising and promotional materials has never been established, for the companies voluntarily agreed to enter into consent orders without admitting any violation of law, and without any findings as to any violations.

Moreover, the companies have been placing the warning statements in countless thousands of advertisements and promotional pieces during the last several years, without challenge by the Commission. The ubiquitous warning by now is imbued in the public mind. The claims which are being made by the Commission here relate basically to alleged miniscule variations in type size and type style and to technical aspects of interpreting the consent orders. To relate these claims to public injury is to raise the spectre of public injury beyond any logical point of argument.

CONCLUSION

For all of the foregoing reasons, appellants respectfully submit that the Order of the District Court denying appellants' motions for a stay of the accumulation of penalties pending final judgment should be reversed and the matter remanded to the District Court with instructions to grant the requested relief.

Respectfully submitted,

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Statutes

Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), as amended, Nov. 16, 1973

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Section 16(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 56(a)(1)

Except as otherwise provided in paragraph (2) or (3), if—

(A) before commencing, defending, or intervening in, any civil action involving this chapter (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action; the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---x

BROWN & WILLIAMSON TOBACCO CORPORATION, :

Plaintiff-Appellant, :

v. : No. 75-6081

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al., :

:

Defendants-Appellees.

---x

PHILIP MORRIS INCORPORATED, :

Plaintiff-Appellant, :

No. 75-6085

v. :

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al., :

:

Defendants-Appellees.

---x

R. J. REYNOLDS TOBACCO COMPANY, :

Plaintiff-Appellant, :

No. 75-6088

v. :

LEWIS A. ENGMAN, Chairman, :
Federal Trade Commission, et al.,

:

Defendants-Appellees.

---x

LOEW'S THEATRES, INC., :

Plaintiff-Appellant, :

No. 75-6087

v. :

LEWIS A. ENGMAN, Chairman, :
Federal Trade Commission, et al.,

:

Defendants-Appellees.

---x

AMERICAN BRANDS, INC., :

Plaintiff-Appellant, :

No. 75-6090

v. :

FEDERAL TRADE COMMISSION, ET AL., :

Defendants-Appellees. :

---x

---x

LIGGETT & MYERS INCORPORATED,	:	
Plaintiff-Appellant,	:	
		No. 75-6089
v.	:	
LEWIS A. ENGMAN, Chairman Federal Trade Commission, et al.,	:	
	:	
Defendants-Appellees.		

---x

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STANLEY A. ROTHSTEIN, being duly sworn, deposes and says that on the 22nd day of September, 1975, he personally delivered two copies of Joint Appeal Brief of Plaintiffs'-Appellants' and one copy of Appellants' Appendix to the United States Attorney for the Southern District of New York, to the New York Regional Office of the Federal Trade Commission, and that he deposited two copies of such Brief and one copy of such Appendix in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, enclosed in postpaid wrappers addressed to:

Office of the General Counsel
Federal Trade Commission
Federal Trade Commission Building
Pennsylvania Avenue at 6th Street, N. W.
Washington, D. C. 20580

Attention: William Cerillo, Esq.

Stanley A. Rothstein

Stanley A. Rothstein

Sworn to before me this
22nd day of September, 1975.

Sarah Shulman

NOTARY PUBLIC

SARAH SHULMAN
Notary Public, State of New York
No. 31-8981835
Qualified in New York County
Commission Expires March 30, 197[illegible]

NOTICE OF ENTRY

Sir :—Please take notice that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.

WEIL, GOTSHAL & MANGES

Attorneys for

Office and Post Office Address
767 FIFTH AVENUE
Borough of Manhattan New York, N.Y. 10022

To

Attorney for

NOTICE OF SETTLEMENT

Sir :—Please take notice that

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.

Dated,

Yours, etc.

WEIL, GOTSHAL & MANGES

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To

Attorney for

Index No. 75-6081 Year 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellant

v.

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defedants-Appellees

AFFIDAVIT OF SERVICE

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To

Attorney for

Service of a certified copy of the within is hereby admitted.

Dated,

Attorney for